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October 27, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket Nos. 91-131 and 93-158

Dear Mr. Caton:

Forwarded herewith on behalf of Crossroads Communications, Inc. are an original and six copies of an Opposition to Contingent Motion for Leave to be filed in the above-referenced proceedings.

If you have any questions concerning this matter, please contact me.

Very truly yours,


James R. Cooke

Enclosure

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

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OCT 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b))	
Table of Allotments)	
FM Broadcast Stations)	
)	
Hazlehurst, Utica and)	MM Docket No. 93-158
Vicksburg, Mississippi)	RM-8239
)	
Flora and Kings, Mississippi)	MM Docket No. 91-131
and Newellton, Louisiana)	RM-7702, RM-7840, RM-7841

To: Chief, Mass Media Bureau

Opposition to Contingent Motion for Leave

Crossroads Communications, Inc. ("Crossroads"), permittee of Station WXFJ(FM), Flora, Mississippi, and a party to the captioned proceedings, by its attorney and pursuant to Commission Rule 1.45, hereby opposes the Contingent Motion for Leave ("Contingent Motion") filed herein by Donald B. Brady ("Brady") on October 12, 1993. In support of this opposition, the following is respectfully submitted.

I. Interest of Crossroads

1. Crossroads was initially authorized to operate Station WXFJ(FM) on Channel 248A. On June 28, 1991 it requested that Channel 247C3 be substituted for Channel 248A at Flora and that its permit be modified to authorize Station WXFJ(FM) to operate

on Channel 247C3.^u At the same time, St. Pe' Broadcasting, Inc. ("St. Pe'"), former licensee of Station WJXN(FM), Utica, Mississippi, filed comments advancing a mutually exclusive proposal that its license be modified to specify operation of Station WJXN(FM) on Channel 265C3 rather than Channel 225A.

2. In a Report and Order released on August 25, 1992, the Mass Media Bureau granted Crossroad's proposal in MM Docket No. 91-131 and denied St. Pe's counter proposal. On September 24, 1992, St. Pe' filed a "Petition for Reconsideration and Stay" of the Report and Order. That Petition is still pending. Consequently, Crossroads cannot proceed with construction of its up-graded facilities since the Commission will not accept an application to up-grade Station WXFJ(FM) until MM Docket No. 91-131 is finally concluded (Rule 1.420(f)).

3. The Mass Media Bureau's Notice of Proposed Rule Making ("NPRM") in MM Docket No. 93-158 was issued in response to a new Petition for Rule Making filed by St. Pe' on December 14, 1992 while its Petition for Reconsideration in the earlier proceeding was still pending.

4. On July 23, 1993, Crossroads filed a "Petition for Extraordinary Relief" ("Petition") in the captioned proceedings. In that Petition, Crossroads argued that the issuance of the NPRM in MM Docket No. 93-158: (i) was procedurally improper; and (ii)

^u See Crossroad's comments in MM Docket No. 91-131.

would, needlessly, further delay the up-grade of Station WXFJ(FM).² Crossroads' Petition urges that the Mass Media Bureau either:

- a) reconsider and set aside its issuance of the NPRM and treat St. Pe's December 14, 1992 Petition for Rule Making as an amendment of its Petition for Reconsideration which resolves the previous conflict between the proposals by Crossroads and St. Pe'; or
- b) forthwith deny St. Pe's Petition for Reconsideration in MM Docket No. 91-131 on its merits so Crossroads can proceed with construction and consider St. Pe's December 14, 1992 petition for rule making as a totally separate proposal in MM Docket No. 93-158.

The latest filing by Brady is simply one further complication in Crossroads' long-pending effort to up-grade its authorization. It further emphasizes the need for the Mass Media Bureau to forthwith take one of the two actions described above.

II. Brady's Expression of Interest is Untimely

5. In its August 24, 1993 Reply Comments herein, Crossroads argued that Brady's August 10, 1993 expression of interest in MM Docket No. 93-158 was untimely. Brady's Contingent Motion clearly demonstrates that Crossroads' argument

² It has now been more than two years since Crossroads filed its up-grade proposal and more than one year since the Mass Media Bureau granted that proposal.

was entirely correct.³

6. Significantly, Brady does not, and cannot, meaningfully argue that there is any genuine uncertainty as to whether his expression of interest was due on or before August 9, 1993. Instead, Brady advances the novel, and entirely inadequate, argument that the expression of interest was timely because:

Neither the NPRM nor the rules that were attached to it set forth a date by which expressions of interest were required to be filed. Given the fact that the Petition was required to file comments, it was reasonable to assume that any other expressions of interest in the channel would be in the nature of "replies" to the comments filed by Petitioner. (Contingent Motion, p. 3.)³

7. The concept of filing expressions of interest in channel allocation proceedings is not new. It was established in Cheyenne, Wyoming FM Allocation, 62 FCC 2d 63, 38 RR 2d 1665 (1976).

³ St. Pe' and Willis Broadcasting Corp. (St. Pe's successor in interest as the licensee of Station WXJN(FM)) filed a joint Opposition to Contingent Motion for Leave on October 21, 1993 in which they persuasively argue that Brady: (i) recognized that August 9, 1993 was the deadline for its expression of interest; and (ii) failed even to make a reasonable effort to meet that deadline. Crossroads will not burden this proceeding with variants of those arguments. Rather, we emphasize that we find the arguments in Paragraphs 3, 4 and 5 of the joint opposition to be entirely persuasive.

³ As the joint opposition of Willis and St. Pe' argues, Brady's actions of August 9, 1993 make clear that he was not in fact then proceeding on the "reasonable assumption" that his expression of interest could be filed as reply comments.

That decision makes clear that expressions of interest are to be filed at the comment stage (at 1671). The so-called "Cheyenne doctrine" was subsequently codified by the Commission in MM Docket No. 83-1148.⁹ In that action as well, the Commission made clear that expressions of interest in new FM allocations were to be filed at the comment stage (Report and Order, Paragraph 7, 56 RR 2d 1255).

III. Other Fatal Defects in Brady's Expression of Interest

8. In addition to being untimely, Brady's expression of interest is otherwise deficient in that it did not include either a certificate of service or a representation that Brady would pay the expenses of all licensees that would be required to change frequencies if the channel allocations requested by St. Pe' were adopted. These are yet additional fatal defects in Brady's expression of interest.¹⁰ The Bureau must reject Brady's woefully belated attempted to cure these defects in his

⁹ Report and Order, 98 FCC 2d 1916, 56 RR 2d 1253 (1984).

¹⁰ Request for Supplemental Information, Brooksville and Punxsutawney, Pennsylvania, 65 RR 2d 493, 495 (1988). (See Paragraph 9.)

Contingent Motion (see pages 2 and 4)."

IV. In any Event, Brady's Expression of Interest Does Not Lie in This Proceeding

9. As Crossroads explained in its August 24, 1993 Reply Comments herein, competing expressions of interest do not lie in situations such as this where the petitioner is seeking allocations which are incompatible with its existing authorization. Remarkably, Brady's Contingent Motion absolutely ignores this point. It is difficult to understand the purpose of Brady's Contingent Motion since it fails even to address this point even though it was specifically raised by both Crossroads and St. Pe' in their Reply Comments herein. Unless Brady can rebut the arguments of Crossroads and St. Pe' on this point, the matters actually raised in Brady's Contingent Motion are simply irrelevant.

V. Conclusion.

For all of the foregoing reasons, the Mass Media Bureau should, forthwith, reject Brady's expression of interest as untimely, defective and inappropriate in the circumstances of this case. The Bureau should also promptly deny St. Pe's September 24, 1992 Petition for Reconsideration in MM

" This proceeding, and Brady's untimely and defective expression of interest exemplify the delays which the Commission has sought to avoid through generally strict enforcement of its procedural rules, Ianta Isabel, Puerto Rico, et al. FM allocations, 63 RR 2d 259, 262 (1987).

Docket No. 91-131 and affirm its allocation of Channel 247C3 to Flora, Mississippi, so Crossroads may proceed with construction of Station WXFJ(FM).

Respectfully submitted,

Crossroads Communications, Inc.

By


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Its Attorneys

October 27, 1993

CERTIFICATE OF SERVICE

I, Georgia L. Duckworth, hereby certify that a copy of the foregoing "Opposition to Contingent Motion for Leave" of Crossroads Communications, Inc. was forwarded via first class U.S. mail, postage prepaid, this 27th day of October, 1993, to each of the following:

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Georgia L. Duckworth